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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

DEBRA A. OPRI et al., Plaintiffs and Appellants, v. LARRY BIRKHEAD, Defendant and Respondent.	B203506 (Los Angeles County Super. Ct. No. BS109143)

APPEAL from an order of the Superior Court of Los Angeles County. Charles Carter Lee, Judge. Affirmed.

Lewis Brisbois Bisgaard & Smith, Raul L. Martinez and Kenneth C. Feldman for Plaintiffs and Appellants.

Trope & DeCarolis, Michael L. Trope and Andrew Stein for Defendant and Respondent.

This lawsuit arises out of the highly-publicized controversy over the paternity of a minor child. Defendant and respondent Larry Birkhead (Birkhead) retained plaintiffs and appellants Debra A. Opri and Opri & Associates (collectively Opri) to represent him in this mayhem. Their relationship, however, broke down, putting lawyer against client in the instant dispute.

Opri sought to compel arbitration of the dispute; Birkhead claimed that the parties did not have a valid agreement to arbitrate. The trial court agreed and denied Opri's request for arbitration. Opri appeals.

We affirm. While the parties entered into an agreement that contains an arbitration provision, they later entered into another agreement that does not provide for arbitration. Because the second agreement constituted a novation of the first agreement, the parties no longer have an agreement to arbitrate their dispute.

PARTIES' CONTENTIONS

At issue in the instant appeal is whether the parties entered into an enforceable agreement to arbitrate this dispute. As set forth below, the circumstances surrounding the execution of all of the relevant documents are hotly contested.

According to Opri, the parties entered into *one* nine-page retainer agreement, which contains an arbitration provision. Birkhead, on the other hand, claims that the parties entered into *two* separate agreements, one on September 29, 2006, and a latter agreement, which replaced the first one, on September 30, 2006; while the first contract (titled legal representation agreement) contains an arbitration provision, the second agreement (titled fee agreement) does not. According to Birkhead, the second agreement constituted a novation of the first agreement. Thus, the parties do not have an agreement to arbitrate.

Even if the parties entered into two agreements, Opri urges us to construe the two agreements together; she challenges the trial court's conclusion that the second agreement amounted to a novation of the first agreement.

At a minimum, Opri argues, the arbitrator, not the trial court, must determine whether a novation occurred.

To place the issues raised in this appeal in context, we briefly set forth the procedural history of the parties' competing positions regarding arbitration.

PROCEDURAL BACKGROUND

1. Opri's Petition to Compel Arbitration; Birkhead's Response; Opri's Reply

On May 29, 2007, Opri filed a petition to compel binding arbitration. She argued that on September 29, 2006, she and Birkhead entered into a legal representation agreement, which contains an arbitration provision on page four. Pursuant to that arbitration clause, Opri sought a court order requiring Birkhead to arbitrate the fee dispute between the parties. Attached to her petition was a copy of the legal representation agreement, which, according to Opri, consisted of one nine-page document.

Birkhead filed a response to Opri's petition to compel binding arbitration. According to Birkhead, the parties entered into two contracts: (1) a legal representation agreement dated September 29, 2006, which consists of pages one through six of the nine-page document attached to Opri's petition; and (2) a retainer agreement dated September 30, 2006, which is titled fee agreement and consists of pages seven through nine of the nine-page document attached to Opri's petition. Birkhead claimed, inter alia, that the September 29, 2006, agreement was extinguished by novation through the execution of the second agreement. Because the controlling "second" agreement does not contain an arbitration provision, Birkhead argued that the parties did not have a valid agreement to arbitrate their dispute.

In support of his position, Birkhead also pointed out that the parties executed a third agreement, titled media agreement with assignment. The media agreement referred to the parties' "retainer agreement dated as of September 30, 2006." It also expressly noted that the media agreement did "not affect or alter any terms or conditions of the Retainer Agreement previously entered into between the Parties dated September 30, 2006, or any other subsequent retainer agreement which may be entered into between the parties in the future for legal services to be rendered by Opri to Birkhead."

In June 2007, Birkhead also filed a request to strike portions of Opri's petition to compel binding arbitration.

On July 5, 2007, Opri submitted her reply to Birkhead's opposition. In support, she offered the declaration of Alex Palabrica (Palabrica), one of her law clerks. Palabrica stated that on September 28, 2006, Opri directed him to prepare a retainer agreement between her law office and Birkhead. After preparing a draft of the retainer agreement for Opri to review, Palabrica "prepared an updated copy of the retainer agreement on September 29, 2006, and typed in the date on the first part of the agreement." According to Palabrica, he "waited until late into the evening for Birkhead. However, . . . Birkhead due to travel changes and/or delays did not arrive at the office to sign the agreement on this date."

"Birkhead did arrive at the office on . . . September 30, 2006." Opri instructed Palabrica "to give the retainer to Birkhead for his review." In Palabrica's presence, Birkhead "reviewed the nine-page retainer agreement, which consisted of the retainer and the fee agreement." Later, when Opri was present, and after he had reviewed the agreement in its entirety, Birkhead signed it. "Birkhead did not execute any documents on . . . September 29, 200[6]."

2. Birkhead's Complaint; Opri's Motion to Compel Arbitration

Meanwhile, on June 1, 2007, Birkhead filed a complaint for breach of fiduciary duty, conversion, fraud, legal malpractice, declaratory relief, and constructive trust.

In response to Birkhead's complaint, Opri filed a petition and motion to compel binding arbitration, reiterating the arguments raised in her original petition to compel.

3. The Two Actions are Deemed Related

The two cases were deemed related on June 15, 2007.

4. Trial Court Dismisses Opri's Petition and Denies Opri's Motion to Compel Arbitration

Oral argument on both Opri's original petition and her motion to compel arbitration was initially heard on July 12, 2007. After taking the matter under submission, the trial court issued its order. It overruled Birkhead's objection number 1 to Opri's petition to compel binding arbitration, and sustained objection numbers two through 76. As for Birkhead's objections to and request to strike portions of Palabrica's declaration, the trial court sustained numerous objections and overruled others.

With respect to Opri's motion to compel arbitration, the trial court continued the matter for further briefing and argument.

Later, on August 21, 2007, the trial court took Opri's petition to compel arbitration under submission again, indicating that no additional papers were required from the parties.

On September 4, 2007, the trial court denied Opri's petition. It found "that to the extent there is any written agreement between the parties, it is the second agreement, which does **not** contain an arbitration clause. The first agreement, pages 1-6, was replaced and extinguished by the second agreement, pages 7-9. Code of Civil Procedure section 1281.2 provides that a court 'shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists . . . .' The weight of the evidence supports the determination that there is no arbitration agreement in this case, and the petition should be denied. Among other things, where a party provides weaker evidence when it could have provided stronger evidence, the fact-finder may distrust the weaker evidence. (See, e.g., CACI No. 203 (2007 ed.); Evid. Code, § 412 ('If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.').) Aside from this point, however, the evidence strongly supports Birkhead's contentions. The agreement on pages 7 through 9 is clearly a separate agreement. Also, although the page numbers are 7 through 9, it is not certain when these numbers were placed on the pages. Furthermore, the subsequent

media agreement refers to a single agreement, the one bearing a date of September 30, 2006, namely, the second one without an arbitration clause."

5. Opri Appeals

On November 2, 2007, Opri timely filed a notice of appeal from the trial court's order denying her petition to compel arbitration, denying her motion to compel arbitration, and dismissing her petition to compel arbitration.

DISCUSSION

I. Did the parties enter into one agreement or two agreements?

First we must determine whether the parties entered into one agreement or two agreements.[1] In answering this query, we keep in mind the relevant standards of review. To the extent we consider questions of fact, our analysis is governed by the substantial evidence standard of review. "When the trial court has resolved a disputed factual issue, the appellate courts review the ruling according to the substantial evidence rule. If the trial court's resolution of the factual issue is supported by substantial evidence, it must be affirmed. [Citation.]" (*Winograd v. American Broadcasting Co.* (1998) 68 Cal.App.4th 624, 632.) Under these circumstances, this court is without power to: judge the effect or value of the evidence; weigh it; consider the credibility of witnesses; or resolve testimonial or evidentiary conflicts in the evidence or in the reasonable inferences that may be drawn therefrom. (*Leff v. Gunter* (1983) 33 Cal.3d 508, 518.)

On the other hand, we review the interpretation of a contract de novo where the trial court based its interpretation solely upon the words of the unambiguous contract, where the relevant admissible extrinsic evidence is not conflicting, or where there is an issue as to the admissibility of extrinsic evidence. (*Morey v. Vannucci* (1998) 64 Cal.App.4th 904, 912–914.)

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[1] At oral argument, Opri conceded that the parties entered into two separate agreements. Because this issue was debated by the parties in their appellate briefs, for the sake of completeness, we explain why we agree that there were two separate agreements.

Applying these legal principles, we conclude that the trial court correctly determined that the parties entered into two separate agreements, the legal representation agreement on September 29, 2006, and the fee agreement on September 30, 2006. After all, Birkhead declared that he separately signed two agreements on two different dates. While Palabrica's declaration purports to refute this evidence, the trial court was free to weigh the evidence and distrust Palabrica's testimony, as it did.[2] The trial court expressly found Opri's evidence regarding the execution of the agreements weaker than Birkhead's evidence. And, the trial court noted that "the evidence strongly support[ed] Birkhead's contentions. The agreement on pages 7 through 9 is clearly a separate agreement."

In urging us to reverse, Opri focuses on the fact that the document is consecutively numbered. This is just one piece of evidence that weighs in favor of Opri. However, in light of the trial court's factual determinations, this argument is not compelling. Moreover, as the trial court expressly commented, "although the page numbers are 7 through 9, it is not certain when these numbers were placed on the pages."

Opri also directs us to the signature block on page 9, in which Birkhead "agree[s] to the terms and conditions of this Legal Representation Agreement." While it is true that the signature block on page 6 mirrors the signature block on page 9, and both refer to a legal representation agreement, we cannot jump to the conclusion that the parties intended one agreement. There is no indication that the legal representation agreement includes the subsequent fee agreement or that the fee agreement is part and parcel of, or a modification of, the legal representation agreement. To make matters worse, the parties' media agreement refers to a "retainer agreement," even though there is no such titled

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[2] Opri argues that the trial court erred in "ignor[ing] Palabrica's declaration merely because of his status as a law clerk." We are not convinced. While the trial court did point out that Palabrica is a law clerk and not an attorney, there was no error. The trial court was simply pointing out an inconsistency in Opri's papers: Opri indicated in her reply brief that Palabrica was an attorney, even though Palabrica stated in his declaration that he is a law clerk.

document. At best, as the trial court found, the media agreement refers to a single agreement dated September 30, 2006, which must be the separate fee agreement.

II. Did the second agreement constitute a novation of the first agreement?

Having determined that the parties entered into two separate agreements, a legal representation agreement on September 29, 2006, and a fee agreement on September 30, 2006, we next must determine the legal effect of the second contract. In other words, we must consider whether the second agreement constitutes a novation of the first agreement.

"'A novation is a substitution by agreement of a new obligation for an existing one with the intent to extinguish the latter.'" (*Meadows v. Lee* (1985) 175 Cal.App.3d 475, 482, fn. 1.) Under principles of novation, a new contract may be substituted for an old contract by "the substitution of a new obligation between the same parties, with intent to extinguish the old obligation." (Civ. Code, § 1531, subd. (1).) A novation is made pursuant to the rules governing contract formation in general. (Civ. Code, § 1532.) Thus, a novation is a "new contract which supplants the original agreement and 'completely *extinguishes* the original obligation. . . .'" (*Wells Fargo Bank v. Bank of America* (1995) 32 Cal.App.4th 424, 431.)

To satisfy the intent requirement of a novation, it must clearly appear that the parties intended to extinguish, rather than merely modify, the original agreement. (*Wells Fargo Bank v. Bank of America*, *supra*, 32 Cal.App.4th at p. 432.)

The question of whether the necessary elements for novation are present is one of fact. (*Wade v. Diamont A Cattle Co.* (1975) 44 Cal.App.3d 453, 457; see also *Howard v. County of Amador* (1990) 220 Cal.App.3d 962, 980 [where there is conflicting evidence, the question as to whether the parties to an agreement entered into a modification or a novation is a question of fact].) However, as noted above, where the issue turns upon the meaning of a written instrument and there is no conflicting extrinsic evidence, then the question is one of law, upon which a reviewing court may exercise its independent judgment. (*Ibid*.)

Sufficient evidence supports the trial court's finding that the parties intended to substitute the September 30, 2006, fee agreement for the September 29, 2006, legal representation agreement. Admittedly, there is no evidence from Birkhead that he intended the September 30, 2006, agreement to supplant the September 29, 2006, agreement. In fact, according to his declaration, he did not carefully review either agreement. And, while Opri argues that the retainer agreement consists of one nine-page document, she never offers any testimony regarding her intent. In her sole declaration, Opri simply declares that on or about September 29, 2006, she and Birkhead entered into a legal representation agreement, which contains an arbitration provision. She never avers, for example, that she intended the fee agreement to be construed with the legal representation agreement as one retainer agreement or otherwise explains the obvious discrepancy in the dates and titles of the documents.

Thus, in order to determine whether the parties intended the fee agreement to constitute a novation of the legal representation agreement, we turn to the agreements themselves. Here, "[t]he [fee] agreement is itself evidence evincive of an intention by both parties that it should constitute a novation, or as our law defines such a transaction, the substitution of a new obligation for an existing one. [Citation.]" (*Producers Fruit Co. v. Goddard* (1925) 75 Cal.App. 737, 754.) In particular, the fee agreement expanded the scope of Opri's representation of Birkhead; while the legal representation agreement limited Opri's representation of Birkhead to the "FAMILY LAW MATTER RE: PATERNITY/CUSTODY ETC]", the latter fee agreement was intended "to be ongoing and to be the Agreement which applies to all matters in which [Opri] represents [Birkhead], currently and in the future." In addition, as Birkhead points out, the fee agreement was expressly intended to be "*the* Agreement." (Italics added.) The parties' use of the word "the" suggests exclusivity (*CD Investment Co. v. California Ins. Guarantee Assn.* (2000) 84 Cal.App.4th 1410, 1421); they intended the second agreement to be their one and only agreement.

Moreover, the fee agreement is more specific regarding fees and costs. While both documents set forth the rates for partners, law clerks, and paralegals, only the fee

agreement specifically sets forth the fee for an associate. And, the fee agreement provides the specific minimum fee for court appearances, a fee not mentioned in the legal representation agreement.

Also, the contracts differ as to the minimum amount that must be maintained in the attorney-client trust account. While the legal representation agreement requires a minimum credit balance of $1,000, the fee agreement requires a minimum balance of $2,500.

In reaching this conclusion that the second contract constitutes a novation of the first contract, we are mindful of the fact that the fee agreement is complete. In *Goodman v. Citizens Life & Cas. Ins. Co.* (1967) 253 Cal.App.2d 807, 816–817, for example, the court concluded that oral promises could not possibly have shown an intent to abandon the prior contract because: "Had the parties abandoned the prior contract and substituted the claimed oral agreement, the sole agreement would have consisted of a termination clause without any underlying contract." (*Id.* at p. 817.) In other words, if all that is left after a claimed novation is just a few lost terms looking for the rest of their contract, then there cannot be a novation. That is not the case here. Unlike the situation in *Goodman*, the fee agreement stands on its own as a valid, enforceable contract.

It follows that we reject Opri's contention that pursuant to Civil Code section 1642,[3] the legal representation agreement and the fee agreement should be construed together.[4] As Birkhead aptly points out, the trial court's finding of novation necessarily means that the trial court rejected the idea that the parties entered into several related

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[3] "Several contracts relating to the same matters, between the same parties, and made as parts of substantially one transaction, are to be taken together." (Civ. Code, § 1642.)

[4] In addressing this issue, we note that "[w]hether Civil Code section 1642 applies in a particular case is a question of fact for resolution by the trial court." (*Brookwood v. Bank of America* (1996) 45 Cal.App.4th 1667, 1675.) It does not appear that Opri raised this point below, thereby forfeiting it on appeal. Nevertheless, for the sake of completeness we reach the merits of this argument first raised on appeal.

contracts as part of a single transaction. (See, e.g., *Pearsall v. Henry* (1908) 153 Cal. 314, 317–319.)

For this reason, Opri's reliance upon *Brookwood v. Bank of America, supra,* 45 Cal.App.4th 1667 is misplaced. Unlike the situation in *Brookwood,* substantial evidence here supports the trial court's conclusion that the legal representation agreement and the fee agreement were not substantially one transaction that should be taken together. (*Id.* at p. 1675.) Rather, the parties signed one agreement on one date and then replaced that agreement with a subsequent contract executed on a different date.

In so holding, we agree with Opri that the fee agreement's silence on the subject of arbitration is not evidence that the parties intended to extinguish that obligation of their original contract. (*Cione v. Foresters Equity Services, Inc.* (1997) 58 Cal.App.4th 625, 638 ["Absent any showing that [the plaintiff-employee's] written employment agreement with [the employer] was either expressly or implicitly inconsistent with his arbitration obligation under Form U-4, [the plaintiff] may not rely on the written employment agreement's silence about dispute resolution to establish that such agreement superseded his Form U-4 obligation to arbitrate"].) However, our concurrence stops there. In light of our conclusion that the fee agreement constitutes a replacement of the legal representation agreement, we find the fee agreement's silence regarding arbitration to be irrelevant for purposes of determining whether the parties intended the fee agreement to supplant the legal representation agreement. The only effect of the fee agreement's silence on the subject of arbitration is that the parties are left with an agreement that does not require them to arbitrate their dispute.

III. Did the trial court properly determine whether there was a novation of the legal representation agreement or should this issue have been resolved by the arbitrator?

For the first time, on appeal, Opri argues that the arbitrator, rather than the trial court, should have determined whether there was a novation of the first agreement. According to Opri, the arbitration provision contained in the legal representation agreement is separable from the agreement in which it is contained. Thus, an arbitrator, not the trial court, should have determined whether the first agreement was extinguished by novation. Opri claims that we can resolve this issue on appeal, even though she neglected to raise it below, because it presents solely a question of law.

We agree with Opri that whether the arbitration provision is separable from the legal representation agreement presents a pure question of law. Thus, we have the discretion to reach the merits of this issue. (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶¶ 8:237, p. 8-157, 8:240.1, pp. 8-159 to 8-160.)

Our Supreme Court has held that "in the absence of a specific attack on an arbitration agreement, such agreement generally must be enforced even if one party asserts the invalidity of the contract that contains it." (*St. Agnes Medical Center v. PacifiCare of California* (2003) 31 Cal.4th 1187, 1198.) Stated differently, "contractual arbitration clauses generally must be enforced where one of the parties seeks rescission of the entire contract on the basis that it allegedly was induced by fraud, mistake, or duress, or where an alleged breach of a warranty or other promise justifies the aggrieved party in putting an end to the contract." (*Ibid*.; see also *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 319, 322–323.) The rationale, as set forth in *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, is "that an arbitration clause is separable from other portions of a contract, such that fraud in the inducement relating to other contractual terms does not render an arbitration clause unenforceable, even when such fraud might justify rescission of the contract as a whole." (*St. Agnes Medical Center v. PacifiCare of California, supra,* at p. 1199.)

This principle, however, does not apply to the instant situation. Birkhead is not arguing that the legal representation agreement is unenforceable because he was duped into signing it. Rather, he is claiming that the parties voluntarily entered into a subsequent agreement, the fee agreement, that constituted a novation of the entire legal representation agreement. Substantial evidence supports the trial court's adoption of Birkhead's position; the fee agreement replaced the legal representation agreement.[5]

Thus, in order for us to agree with Opri's claim on appeal, we would have to find a partial novation of the legal representation agreement. Yet, Opri offers no legal authority for the concept of a partial novation. In fact, California law indicates otherwise. Civil Code section 1530 defines novation as "the substitution of a new obligation for an existing one." Moreover, when there is a novation, the old agreement is "'entirely abrogated or extinguished,'" and "the rights and duties of the parties must be governed by the new agreement alone." (*Alexander v. Angel* (1951) 37 Cal.2d 856, 862.)

The foreign authorities cited by Opri in her opening brief do not aid her cause on appeal primarily because, like the provision of the treatise cited, these courts apply federal substantive law, not California law. (See, e.g., Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2008) ¶¶ 5:79, pp. 5-60 to 5-61, 5:77.1, p. 5-59; *Buckeye Check Cashing, Inc. v. Cardegna* (2006) 546 U.S. 440, 445 ["as a matter of substantive federal arbitration law, an arbitration provision is severable from the remainder of the contract"].) Yet, Opri's petitions to compel arbitration were brought pursuant to California law and the Code of Civil Procedure only. Even on appeal, Opri fails to establish that federal law applies to the instant dispute. (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852 [appellant bears the burden of supporting a point with reasoned argument]; *County of Sacramento v. Lackner* (1979) 97 Cal.App.3d 576, 591 [appellant must present argument on each point made].)

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5 For this reason, *China Resource Products* (*U.S.A.*) *v. Fayda Intern.* (D. Del. 1990) 747 F.Supp. 1101 is distinguishable. In that case, the court found no novation as a matter of law. (*Id.* at p. 1106.)

For this reason, we decline to follow the reasoning of *Rainbow Investments, Inc. v. Super 8 Motels, Inc.* (M.D.Ala. 1997) 973 F.Supp. 1387, first cited in Opri's reply brief.

As for the other authorities referenced by Opri, they do not change our conclusion. All but two do not address the concept of novation. Rather, one concerns termination of two agreements by the expiration of their terms (*Primex Intern. Corp. v. Wal-Mart Stores* (1997) 89 N.Y.2d 594, 599 [657 N.Y.Supp.2d 385, 679 N.E.2d 624, 626]). Yet Opri does not explain how this factual scenario applies to the situation presented herein, where one agreement was supplanted by a novation. The remaining authorities concern cancellation of an agreement. (See, e.g., *Wilson Wear, Inc. v. United Merchants & Mfrs., Inc.* (7th Cir. 1983) 713 F.2d 324, 328, superseded by statute on other grounds as stated in *Stedor Enterprises, Ltd. v. Armtex, Inc.* (4th Cir. 1991) 947 F.2d 727, 729–730; *Shotto v. Laub* (D.Md. 1986) 632 F.Supp. 516, 521; *Maria Victoria Naviera, S.A. v. Cementos Del Valle* (2d Cir. 1985) 759 F.2d 1027, 1031; *Flender Corp. v. Techna-Quip Co.* (7th Cir. 1992) 953 F.2d 273, 277.) Under California law, cancellation of a contract is different than a novation. "Cancellation abrogates so much of the contract as remains unperformed; future obligations are terminated, but all prior accrued rights remain and are enforceable." (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 926, p. 1023.) "A novation completely *extinguishes* the original obligation." (1 Witkin, *supra*, § 961 at p. 1052.) Opri fails to discuss whether, under either federal law or the law of these jurisdictions, a cancellation equates with a novation. She also neglects to explain how, in light of the distinction between these two concepts in California, these authorities compel reversal of the trial court's order.[6]

While *Goshawk Dedicated v. Portsmouth Settlement Co.* (N.D.Ga. 2006) 466 F.Supp.2d 1293, 1299–1300 (*Goshawk*), first cited in the reply brief, holds that a novation does not extinguish a prior obligation to arbitrate, that case is factually

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6 In any event, it is well-established that we are not bound by decisions of other jurisdictions. (*Gentis v. Safeguard Business Systems, Inc.* (1998) 60 Cal.App.4th 1294, 1306.)

distinguishable. In *Goshawk*, two entities were parties to a contract. (*Id*. at p. 1296.) Later, one entity was replaced with another by novation. (*Id*. at p. 1300, fn. 3.) At issue was whether the novation extinguished the prior agreement to arbitrate between the two original parties. (*Id*. at p. 1300.) The *Goshawk* court determined that the substitution of one party for another did not evince any change of the original parties' intent to be bound under the original arbitration agreement. (*Ibid*.) In other words, the *Goshawk* court implicitly found that all the parties intended to do through the novation was change parties.

In contrast, in the instant case, the same people are parties to both agreements. Under these circumstances, we can presume that by entering into an entirely new agreement, the parties intended to obliterate all prior obligations between them, including the agreement to arbitrate.

Finally, we point out that *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534 is readily distinguishable. In that case, the court did "expressly hold that a party's contractual duty to arbitrate disputes may survive termination of the agreement giving rise to that duty." (*Id*. at p. 545.) However, the Court of Appeal was careful to limit its holding to the factual framework presented therein. (*Id*. at p. 546, fn. 8.) After all, in that case, the parties' underlying agreement "expressly contemplated a continuous relationship for five years after contract termination." (*Ibid*.) In contrast, in the instant case, the legal representation agreement has been entirely replaced by the fee agreement, which does not contain an arbitration provision.

Because the entire legal representation agreement was abrogated by virtue of the novation, the parties do not have an enforceable arbitration provision. Absent an agreement to arbitrate, parties cannot be compelled to submit their dispute, including the question of whether a novation occurred, to arbitration. (*Cione v. Foresters Equity Services, Inc.*, *supra*, 58 Cal.App.4th at p. 634 ["'The right to arbitration depends upon contract; a petition to compel arbitration is simply a suit in equity seeking specific performance of that contract. [Citations.] There is no public policy favoring arbitration of disputes which the parties have not agreed to arbitrate. [Citation.]' [Citation.]"].)

IV. The remaining arguments are moot.

In light of our conclusions above, all remaining arguments raised by Opri are moot.

DISPOSITION

The order of the trial court is affirmed. Birkhead is entitled to costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, Acting P. J.
DOI TODD

_____, J.
CHAVEZ